Abstract

A

48 I.A.2 15

No. 11883

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WAGNER SHEET METAL CO., Plaintiff-Appellant, vs. MRS. VERNON M. BARNES, Defendant-Appellee.	Appeal from Circuit Court DuPage County

CARROLL - J.

This is an action under the Family Expense Act (Ill. Rev. Stat. 1957, Chap. 68, Sec. 1, et seq.) to recover a balance allegedly due on two heating and air conditioning units installed by plaintiff for the defendant's deceased husband.

In substance it is alleged in the complaint that defendant was the wife of and lived with Vernon M. Barnes, deceased; that on June 25, 1957, plaintiff installed heating and air conditioning units in the residences of the decedent and defendant at 6 North 135 Harvey Road, Medinah, DuPage County, Illinois, and on County Line Road in Wheeling, Illinois; that there is a balance due plaintiff for said units of $2,231.50; that the price of said units "was a proper item for defendant's family"; that by virtue of the Family Expense Act the defendant became liable for the said balance due the plaintiff. In her answer, defendant denied liability for the balance claimed by plaintiff. Trial by the court on the pleadings and a stipulation of facts resulted in a judgment in favor of defendant. Plaintiff has appealed.

Abstract

It appears from the stipulation of facts filed in the trial court that plaintiff contracted with Vernon M. Barnes, deceased, and formerly the defendant's husband, for the installation of heating and air conditioning units for a residence to be erected at 6 North 135 Harvey Road, in Medinah; that the installation was completed about June 25, 1957; that in making said contract, Vernon M. Barnes acted as a contractor for defendant; that all of plaintiff's dealings with reference to said contract were had with Vernon M. Barnes until his death, long after completion of the work contracted for; that at the time the contract was made it was contemplated that the structure to be built would be used as a residence by Vernon M. Barnes and the defendant; that the said structure was so used until the death of Vernon M. Barnes; that defendant continues to reside therein; that on or about June 25, 1957, after the units had been installed, Vernon M. Barnes, deceased, executed and delivered a promissory note to plaintiff in payment for the air conditioner installed in the Barnes residence; that plaintiff then gave Vernon Barnes a waiver of lien pursuant to the provisions of the Illinois Mechanic's Lien Act; that Vernon M. Barnes at that time told the president of the plaintiff company that the note would be paid "out of the loans from the homes he was going to build in the contracting business"; that Barnes did not pay the note in question; and that subsequently plaintiff obtained judgment against Vernon M. Barnes on said note.

Upon the foregoing uncontroverted facts, we think the question decisive of this appeal is whether the indebtedness arising out of the contract for the installation of the heating and air conditioning systems was extinguished by plaintiff's ac-

ceptance of the promissory note of Vernon M. Barnes. If the effect of such acceptance was the extinguishment of the contract indebtedness, then it follows that any liability of defendant under the Family Expense Act was likewise extinguished.

The general rule is that the mere giving of a note does not, of itself, extinguish a precedent debt unless accepted or agreed to be accepted as payment. Whether or not a promissory note may be held to represent satisfaction of the original obligation depends upon the intention of the parties. A statement of this rule is found in Baker v. Salzenstein, 314 Ill. 226, 145 N.E. 2d 355, where the Supreme Court said:

> "The rule in this state is that the giving of a promissory note in the place of an already existing obligation does not, of itself, operate as a satisfaction of the original obligation unless it is made and accepted as payment thereof. Whether or not it was so given and accepted is a question of fact which depends upon the intention of the parties. Boulter v. Joliet Nat. Bank, 295 Ill. 594, 129 N.E. 513. If such note is made and accepted for such purpose, the former obligation is satisfied. Belleville Savings Bank v. Bornman, 124 Ill. 200, 16 N.E. 210; Jansen v. Grimshaw, 125 Ill. 468, 17 N.E. 850."

It is not necessary that such intention be manifested by an express agreement, but may be inferred from the circumstances surrounding the particular transaction involved. Rayfield, et al v. Tinsher, et al, 180 Ill. App. 454.

The record in the case at bar would appear to clearly establish that the note of Vernon M. Barnes was given in payment for the heating and air conditioning units installed in the Barnes residence. In a discovery deposition which was incorporated in the stipulation of facts, the president of the plaintiff corporation testified that when the note was given,

he and Barnes discussed payment for the two units which plaintiff had installed, and that the note represented payment in full for all work done on the Barnes residence. In addition to such admission by the plaintiff's president, there are other circumstances from which it would appear to be reasonable to infer that the parties intended the note to constitute payment for the work and materials furnished under the contract involving the Barnes residence. Although the note was given June 25, 1957, plaintiff took no steps to recover against the defendant under the Family Expense Act until April 10, 1961 when the instant action was instituted. If, as plaintiff now contends, it considered defendant liable for the debt in question, it would be difficult to believe that it would wait four years before attempting to enforce such liability. There is also the additional circumstance that Vernon M. Barnes was a contractor engaged in building houses, from which it can be reasonably inferred that he would receive monies on future contracts; and that at the time it took his note plaintiff intended to take the same in place of the original Barnes indebtedness.

Under the facts disclosed by this record, we are of the opinion that the acceptance of the note in question extinguished the original obligation under the contract between plaintiff and Vernon M. Barnes. As a result any claimed liability of the defendant under such contract has also been extinguished.

In view of the conclusion reached, we deem it unnecessary to consider other points argued in the briefs, and which pertain to the question whether the installation of an air conditioning system in a residence is a family expense.

The judgment of the Circuit Court of DuPage County is affirmed.

AFFIRMED

Abrahamson P.J. and Moran J. concur

Abstract

48 I.A.2 118

No. 11879

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHARLES W. RUTTER and JOHN L. LAMB, Plaintiffs-Appellees, vs. WILLIAM BASARA, Defendant-Appellant.	Appeal from Circuit Court, Winnebago County

CARROLL - J.

This is an action for personal injuries and property damage sustained by plaintiff, Charles Rutter, when the automobile which he was driving came into collision with another automobile owned and operated by defendant. A trial by the court without a jury resulted in a judgment in favor of plaintiff in the sum of $2,800.00. The defendant has appealed.

Upon the sole ground that the award of damages is excessive, we are urged to reverse the judgment and remand the cause for a new trial. Since the issue of liability has been eliminated, our consideration of the evidence is necessarily confined to that pertaining to the question of damages. Plaintiff, Rutter, testified that following the accident he was taken to Freeport Memorial Hospital where he was examined by a doctor; that he had a broken rib; that his left thumb was broken; that he saw the doctor for examination on two subsequent occasions; that he was in pain as

IN USE

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Secret Service

CHARLES V. MURPHY and
JOHN L. LAWS,

Plaintiffs-Appellees,

-vs-

WILLIAM WARREN,

Defendant-Appellant.

Appeal from
District Court,
Eleventh Judicial

CHARLES V. MURPHY and JOHN L. LAWS,

Plaintiffs-Appellees,

-vs-

WILLIAM WARREN,

Defendant-Appellant.

Appeal from
District Court,
Eleventh Judicial

a result of his injuries; that for about three weeks it was difficult for him to breath because of the broken rib; that his broken thumb "hurts most of the time, it is sore most of the time, sometimes it is much worse"; and that it was sore at the time of the trial. Plaintiff operates a grocery store and performs manual labor in cutting meats and handling groceries. He testified that because of the thumb injury he has lost some of the grip in his hand, which bothers him in doing his work in the store. Proof was introduced showing the cause of repairing plaintiff's car to be $940.02. There is also evidence that while his car was undergoing repairs, plaintiff rented a car for which he paid $91.00; that because of his injuries he was required to pay out $75.00 for extra help in the store.

It is the well established rule that where a case is tried by the court without a jury, its findings are entitled to the same weight as that accorded to a jury verdict, and in reviewing such findings this court is guided by the same principles as would be applied had there been a jury verdict. Rude v. Seibert 22 Ill. App. 2d 477. Balfour v. Balfour 20 Ill. App. 2d 590. Bovaird Supply Co. v. McClement 32 Ill. App. 2d 224. One of these principles is that the amount of damages to be awarded in a personal injury case is a matter within the discretion of the jury, and will not be disturbed by a reviewing court unless so palpably excessive as to indicate the jury acted from passion, prejudice, or other improper motive. Lester v. Hennessey 29 Ill. App. 2d 11. Zanter v. Hough 35 Ill. App. 2d 72. In the instant case, the question of the amount of damages to be assessed was one of fact to be determined by the trial court and its discretion with respect

thereto was the same as that with which a jury is vested. This court has no right to substitute its judgment for that of the trial court. We are concerned only with the question whether the fact trier on the evidence before it could have awarded plaintiff damages in the amount of $2,800.00. Schrage v. Allied Paper Corp. 34 Ill. App. 2d 9. Smelcer v. Sanders 39 Ill. App. 2d 164.

Upon the record before us it is apparent that reasonable men might differ in their views on the question whether the sum awarded plaintiff exceeds an amount representing fair and reasonable compensation for his injuries. Accordingly we cannot say that in assessing damages the trial court acted from other than a proper motive. Hulke v. International Mfg. Co. 14 Ill. App. 2d 5. There is no fixed rule by which damages in personal injury cases can be fixed with exactness because compensation for such injuries does not lend itself to mathematical computation. The only question is whether the award of damages made by the trial court meets the requirement that it fall within the necessarily flexible limits of fair and reasonable compensation. Smelcer v. Sanders, supra.

From our examination of this record we are satisfied there was sufficient evidence to support the trial court's finding on the issue of damages, and cannot say the amount allowed was excessive.

The judgment of the Circuit Court of Stephenson County is affirmed.

AFFIRMED

Abrahamson P.J. and Moran J. concur.

Abrahamson P.J. and Moran J. concur.

Abstract

No. 11829

48 I, A 2/71

FILED

APR 10 1964

HOWARD K. KELLETT
Clerk Pro Tempore Appellate Court Second District

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ROBERT V. McHALE, Plaintiff-Appellant, vs. DAYTON MARRS, Defendant-Appellee.	)	Appeal from the Circuit Court of Boone County

MORAN - J.

This is a personal injury suit arising out of an automobile accident. The defendant filed a counterclaim, and the jury returned a verdict against the plaintiff on his complaint and in favor of the defendant on his counterclaim in the amount of $5,500.00. Plaintiff-counterdefendant appeals, claiming that the verdict is against the manifest weight of the evidence and that the trial court erred in refusing one of his instructions.

The trial was concluded on November 29, 1962. Appellant's abstract of record shows that his notice of appeal was filed on April 15, 1963. The notice of appeal was due no later than sixty days after the order denying appellant's post trial motion, Ill. Rev. Stat. c 110 sec. 76 (1961). From appellant's abstract of record, it is impossible to tell whether this appeal is timely, since the abstract avoids any reference to the date of the denial of the post trial motion. An abstract should contain information sufficient to show that the necessary steps in the appeal have been taken, and, under some circumstances, its failure to do so could, of

Abstract

FILED

APR 10 1984

HOWARD K. KELLETT
Clerk Pro Tempore Appellate Court Second District

itself, justify dismissal of the appeal. Ellet v Wyatt, 345 Ill. App. 420, 422, 103 N.E. 2d 526 (4th dist 1952). However, the problem here goes deeper than that.

It appears from the additional abstract filed by appellee that the order denying appellant's motion for a new trial was entered on February 8, 1963. Thus, the notice of appeal was filed six days late.

The filing of a notice of appeal within the period limited by statute is mandatory and jurisdictional. Pruitt v Motor Cargo, Inc., 30 Ill. App. 2d 222, 227, 173 NE 2d 851 (1st dist 1961); Marlas v Virekeos, 14 Ill. App. 2d 1, 4, 142 NE 2d 808 (1st dist 1957). Appellant's brief and argument gives no more hint of a late notice than does his abstract. Appellee is the first to raise the question and he does so by including it as one of the points in his brief and argument. Appellant argues in a reply brief that the matter of the late notice of appeal can only be raised by a motion to dismiss, and that by filing an answering brief, appellee has waived the point. Appellant cites as his only authority for this proposition the First District case of Thrift Inc. v State Bank and Trust Co., 298 Ill. App. 501, 19 NE 2d 126 (1st dist 1939), which is not good authority, since, while the case itself has not been expressly overruled, the First District has expressly overruled a similar case and has rejected the doctrine that a late notice of appeal can be challenged only by motion. Marlas v Virekeos, supra. See also Pruitt v Motor Cargo, Inc., supra, 30 Ill. App. 2d 228. The Marlas case held that the tardy filing of a notice of appeal has the same effect as the failure to file any notice at all, and we agree. The filing of the notice within the designated time "'... is a requirement of the statute and is a matter that cannot be waived by agreement of parties nor supplied by estoppel arising out of the conduct of either party.'" Marlas v Virekeos, supra, quoting from Wishard v School Directors, 279 Ill. App. 333, 335 (4th dist 1935).

Appellant's late notice of appeal was a nullity. There is no appeal here and nothing to dismiss. The appropriate procedure is to strike the cause from the docket,

Chicago Housing Authority v Frank, 335 Ill. App. 456, 460, 82 NE 2d 205 (1st dist 1948); Wishard v School Directors, 279 Ill. App. 333, 335 (4th dist 1935); Veach v Hendricks, 278 Ill. App. 376, 378 (4th dist 1935), and it is so ordered.

Cause stricken.

Abrahamson, P. J., and Carroll, J., concur.

property for some friends, putting up $28,000 for this purpose. The deal was closed by the owners' warranty deed to Mr. and Mrs. Ellis, defendants herein, and on the same day they contracted to sell it to Mr. and Mrs. Boyden, also defendants herein, for a price of $28,000 payable in installments of $300 per month.

That transaction is not under attack in this suit. Mr. Ellis testified that he contributed nothing to the consideration, the entire $28,000 was handed to him by Mr. Hooks, so Mr. Ellis properly regarded himself as agent or go-between for Mr. Hooks. He states the installments had been paid to him and that he cashed the checks and turned the money over to Mr. Hooks.

The attack herein is against a quit claim deed of subsequent date, in which Mr. and Mrs. Ellis were named as grantors, and the Children's Training School, a corporation, as grantee.

Mr. Hooks died some three years after the date of this deed. This suit was filed by the administrator and sole heir of the Hooks' estate, asserting the deed was not delivered, and seeking to compel the Ellis' and the school to convey the property, and assign the contract of sale to plaintiff, and for an accounting. The chancellor gave due consideration to the Master's report and exceptions thereto. The exceptions were overruled, the report approved, and the suit dismissed at plaintiff's costs.

Some of the argument in this court pertains to the nature of the premises where the quit claim deed was executed and kept. Mr. Hooks lived alone in an apartment of several rooms attached to the school. He used one room as an office, where he transacted his own business, also the corporate business of the school. He was the president and had custody of the corporation's books and records which he kept in a cupboard next to his desk. There may have been some personal papers in the same cupboard, this was not definitely shown. But the fixed place for the corporate records was known to

We cannot regard this case as comparable to the ordinary situation, where the party having the record title retains a deed in his possession. That would be consistent with an intention to decide later whether to complete the transaction, or to destroy the deed and retain the title. Such an intent would give the instrument a testamentary character for which it is not qualified. That is the type of case in which a deed is held void for lack of delivery. 16 Am. Jur. Deeds, Sec. 142.

This could not have been the intention of Mr. Hooks, since the mere destruction of the deed would not put a legal title in him which he never had. Moreover, when the owners of record executed the deed, they were regarding the school as the grantee. It was essential that this deed be delivered and they did deliver it by handing it to, or leaving it in possession of, corporate officials of the named grantee.

We are constrained to hold that this was an absolute delivery, effective immediately, and the effect could not be altered by later events. Indeed, this is the rule even where possession is retained by the record owner after some symbolic delivery, as has been stated:

"Apart from proof of delivery by a showing of a change of physical custody, a deed is constructively delivered when the grantor has parted with the right to retain it. In all cases where a deed is found in the grantor's possession, the question is, would the grantor have the right to retain the deed as against the grantee? The mere fact that his continued possession gives him the physical opportunity to destroy the deed is immaterial because he has not the right to do so; and if he should destroy it, the deed would nevertheless be operative by reason of the prior constructive delivery." 16 Am. Jur. Deeds, Sec. 130.

But, the plaintiff contends that Mr. Hooks was the beneficial owner of the property and so should be treated the same as an owner

of record, and that his intention is of importance.

It is in evidence that Mr. Hooks was aged and crippled so that he had difficulty getting about. He was the founder of this school and had deeded other property to it so that this transaction was not something new or startling. The school was supported by income from his prior gifts and the deeds to those properties were probably part of the corporate papers of which he had custody. Mr. Ellis testified that occasionally, at Mr. Hooks' request, he deposited the Boyden monthly payment in the school bank account. Mr. Hooks had his personal account in a different bank, and Mr. Ellis did not know what was in that account, and he never made a deposit therein.

The fact that income from this property went to the named grantee at least on some occasions, strongly corroborates the theory that the deed was intended to be effective according to its terms. That appears to be the intention of Mr. Hooks as well as Mr. Ellis. This is evidence indicating a transfer of possession, as well as title, and thus becomes the converse of a case in which the grantor retains possession of the property, indicating an intention not to convey. Wilenou v. Handlon, 207 Ill. 104.

To the extent that the intention of Mr. Hooks is important, there is ample evidence to support the finding that he intended the school to own this property, and the facts come well within the rules announced in Payne v. Henderson, 340 Ill. 160, 172 N.E. 173; and Dunn v. Heasley, 375 Ill. 43, 30 N.E. 2d 628.

The chancellor gave due consideration to this evidence and approved the Master's report. The decree is affirmed.

DECREE AFFIRMED

Culbertson, P.J. and Roth, J. concur.

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49195

LESTER F. LAMB,

Plaintiff and Counter-Defendant-Appellee,

v.

ALAN HORWICK,

Defendant and Counter-Plaintiff-Appellee.

ALL STATE INSURANCE COMPANY,

Intervenor-Appellant.

48 I.A.2d 251

A

Appeal from the

Circuit Court

of Cook County.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This case presents the same primary question that was before this court in the case of Wert et al v. Burke et al, No. 49196, and is governed by our opinion in that case rendered on April 2, 1964. We there held that an insurer providing "uninsured motorist coverage" was entitled to intervene in a suit brought by the insured against the uninsured motorist. We stated, however, that such intervention should be allowed on conditions set forth in the opinion. Whether all such conditions apply to the case before us is left to the discretion of the trial court.

The order is reversed and the cause remanded with directions to allow the petitioner to intervene upon the conditions hereinbefore stated, and for such other and further action as is not inconsistent with the views hereinbefore expressed.

Order reversed and cause remanded with directions.

Dempsey and Sullivan, JJ., concur.

Abstract only.

49267

(48 I.A.2 291)

NORVELL MOORE,

Plaintiff-Appellant,

BILLEE B. BOLTON,

Plaintiff-Appellant,

v.

HANK NICHOLS and THE CHICAGO TRANSIT AUTHORITY,

Defendants-Appellees.

CONSOLIDATED APPEAL FROM

MUNICIPAL COURT

CHICAGO

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Norvell Moore and Billee B. Bolton filed separate statements of claim against Hank Nichols and The Chicago Transit Authority to recover damages for personal injuries suffered while riding in an automobile being driven by Nichols. A previous statement of claim had been filed against the same defendants by Lonnie Nelson and Ruby Hall. The respective defendants filed answers and the cases were at issue. On March 28, 1961, on motion of Nichols, the three cases were consolidated on the basis that they involved common questions of law and fact. An affidavit filed by Nichols asserted that each action arose out of a collision at or near 47th Street and Southpark Boulevard in Chicago on or about January 15, 1960. Thereafter, pursuant to notice, Nichols moved to strike the statements of claim of Moore and Bolton for failure to answer interrogatories. On May 26, 1961, the court entered an order continuing the motion to June 27, 1961, and giving plaintiffs 30 additional days to answer the interrogatories. On June 27, 1961, the court granted an additional 30 days to answer the interrogatories and continued the motion to strike as to all plaintiffs to August 21, 1961. The appellants have not answered the interrogatories or excused their failure to answer.

On August 21, 1961, the court ordered that Bolton and Moore "only" be dismissed for failure to answer interrogatories. No

motion to vacate the order of dismissal was presented within 30 days under the provisions of Sec. 50(6) of the Civil Practice Act (adopted by the Municipal Court). Plaintiffs did not appeal from the order within 60 days nor did they file a petition for leave to appeal within 1 year of the entry of the order. On March 7, 1963, plaintiffs' attorney received through the mail a notice from the court setting the case for a pre-trial hearing to be held on March 20, 1963. There is a notation on the record of the case for that day of "Pre-trial held. Set for trial April 18, 1963." The record shows that on April 18, 1963, the court entered an order dismissing the cause as to Moore and Bolton for failure to answer the interrogatories "as of August 21, 1961." On April 23, 1963, the court denied the motion of Moore and Bolton to vacate the order of dismissal. The motion was supported by the petition of Moore and Bolton and the affidavit of their attorney. Moore and Bolton appeal from the order of April 18, 1963, dismissing their consolidated action, and the order of April 23, 1963, overruling the motion to vacate the order of dismissal of April 18, 1963, and ask the orders of April 18, 1963 and April 23, 1963, be vacated and that the cause be remanded with directions for a trial on the merits.

The consolidated case was dismissed as to Moore and Bolton on August 21, 1961. There was no appeal from that order. If the court erred in entering the order of dismissal in 1961, plaintiffs could move to vacate that order within 30 days under the provisions of Sec. 50(6) of the Civil Practice Act (adopted as a rule of the Municipal Court) and could also appeal within 60 days from the order of August 21, 1961, or within 60 days from the entry of an order denying relief under Sec. 50(6) of the Civil Practice Act. Appellants did not seek relief by petition filed within 2 years after the entry of the order under Sec. 72 of the Civil Practice Act (adopted as a

rule by the Municipal Court). The dismissal order of April 18, 1963 was a nullity and could not and does not affect the validity of the order of August 21, 1961.

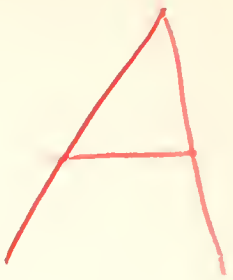
Appellants argue that subsequent to the 1961 dismissal the parties to the litigation appeared voluntarily, participated in the proceedings and thereby revested the court with jurisdiction of the subject matter and the parties. It is well settled that where the court loses jurisdiction of the parties it may be revested with jurisdiction by the subsequent conduct of the parties inconsistent with the dismissal of the action. See Ridgely v. Central Pipe Line Co., 409 Ill. 46; Brown v. Miner, 408 Ill. 123; Craven v. Craven, 407 Ill. 252. There is no statement in the record that the defendants appeared at the pre-trial proceeding or otherwise submitted to the jurisdiction of the court. In their brief appellants say "that after the pre-trial of the cause in which all parties participated, no one questioned the jurisdiction of the court." The record does not support this statement. The affidavit in support of appellants' motion to vacate the order of April 18, 1963, does not say that any attorney for either defendant was present or participated in the pre-trial proceeding. The affidavit does not claim that the attorney for either defendant was present in court on the day the case was set for trial or participated in the proceedings in any way. No claim is made in the affidavit that the affiant talked to any attorney representing The Chicago Transit Authority. In our opinion the affidavit filed by appellants fails to bring them within the cases which decide that after a dismissal and the passing of "term-time" the court may be revested with jurisdiction.

The court had the power to enter the order of dismissal on August 21, 1961. Even though the court erred in entering that

order the appellants may not collaterally attack it. We cannot affirm the order of April 18, 1963 as the case had been terminated on August 21, 1961. The orders of April 18, 1963 and April 23, 1963 should be expunged. The order of dismissal as to Moore and Bolton entered on August 21, 1961 stands. The appeal in the instant case is dismissed.

APPEAL DISMISSED.

FRIEND, J., and BRYANT, J., concur.



49499

48 I.A.2d 401

PEOPLE OF THE STATE OF ILLINOIS,	)	
Defendant in Error,	)	WRIT OF ERROR TO THE CRIMINAL COURT OF COOK COUNTY, ILLINOIS.
v.	)	
JOSE ANTONIO PAZ,	)	
Plaintiff in Error.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant was charged with illegal possession of narcotics. On information from an informer, police entered a room in a hotel where according to the testimony for the state they found the defendant in bed with a woman. The defendant admitted that he had narcotics and indicated that they were in his sports jacket and shirt which were hanging in a closet. The police went to the closet and took out two containers, one containing 54 packages of narcotics and one 24. The evidence supporting these facts was convincing. The only witness for the defense was the defendant himself. The woman he was with was not produced. A subpoena issued for her was returned unserved.

Counsel for defendant, with a zeal on behalf of his client that is appealing but excessive, presented an affidavit signed by counsel himself, setting forth facts which he says were revealed to him in conversations with the woman found with defendant in the hotel room and with another possible impeaching witness. He recognizes this is hearsay, but suggests to the court we should use our discretion as to whether we should accept it. We have no such discretion. The hearsay rule in our state and in our country is still very much alive. Even assuming that a relaxation of it

might be desirable, we doubt that it will ever be sound practice in any jurisdiction to try a case upon the affidavits of the lawyers representing their respective clients. It would hardly lead to good results. Moreover, this is a reviewing court and we must determine the issues on the record made in the trial court.

We have considered the other points raised by counsel and they do not constitute a basis for reversal. The judgment is affirmed.

Judgment affirmed.

Dempsey and Sullivan, JJ., concur.

Abstract only.

02

A

49550

48 I.A.2402

PEOPLE OF THE STATE OF ILLINOIS,	)	
Defendant in Error,	)	WRIT OF ERROR TO THE
v.	)	CRIMINAL COURT OF
MOODY TOLLIVER,	)	COOK COUNTY.
Plaintiff in Error.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant was tried without a jury and was convicted on the charge of burglary of the apartment of one James O. Grey, Sr. The sole issue for review is the sufficiency of the defendant's identification. Two eyewitnesses to the crime, Herman Terry, age 14, and James Grey, Jr., age 12 (the son of James O. Grey) testified for the state.

Terry lived in an apartment next door to the Greys. He identified the defendant as one of two men he observed drive up in a Buick automobile and get out of the car in the alley in the rear of the apartment building in question. From the window in his apartment, he saw the two men prying at the door of Grey's apartment with a steel instrument. He then went to the gasoline filling station about a block away to get James Grey, Jr. He found Grey, Jr. there and told him what was happening. The two boys returned to the apartment building. Terry went to his own apartment to lock it and then returned "to Jimmy's house," where Jimmy told him some one had stolen his hi-fi set.

James Grey, Jr. testified that he went home through the alley after talking with Terry and that he saw the defendant and another man putting his father's hi-fi set in a Buick automobile. He identified the defendant in a five man

line-up six days later. Although he was unable to furnish the police with the complete license number of the car, he testified that it was a four-door dark grey Buick with a license number the first three digits of which were 319.

Terry in his testimony described the car as a grey Buick. "I think it was light grey." He was uncertain about the color, but concluded that it was grey and white. Defendant Tolliver testified that he had an ivory white Buick with a black top and red bumpers. The first three numbers of his license plate corresponded to Grey, Jr.'s description.

Officer Cornelius Johnson testified that he received descriptions of the suspects to the burglary from both Terry and Grey, Jr. and that the description given him of one suspect included a facial scar extending from one ear down to his neck, and that he observed, shortly after the defendant's arrest, that defendant had such a scar.

Defendant's principal argument rests on minor disparities in the testimony of Grey, Jr. and Terry. It is our opinion that these lend credibility to their testimony. Two boys on an exciting occasion like this could hardly be expected to recall in complete detail all the events in question. We have read the transcript of their testimony and while from the cold record we are not in position to judge its credibility, it bears the earmarks of the truth. In any event, such disparities go only to the weight of the testimony. People v. Clay, 27 Ill. 2d 27, 187 N.E.2d 719. The evidence supports the trial court's finding that the defendant was guilty beyond a reasonable doubt.

The judgment is affirmed.

Judgment affirmed.

Dempsey and Sullivan, JJ., concur.

Abstract only.